UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

CHRISTOPHER R. WINKLER, Complainant	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 96B00065
	)	
TIMLIN CORPORATION, Respondent.	)	

DECISION AND ORDER TO DISMISS AND TO DENY APPROVAL TO AGREED VOLUNTARY DISMISSAL
(January 30, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr., on behalf of Complainant.**
Terence L. Green, Esq., on behalf of Respondent.

I. Procedural History

Administrative adjudication of this case has its genesis in a proceeding initiated by Christopher R. Winkler (Winkler or Complainant) in June, 1995, when he filed a unitary Charge of Discrimination with the California Department of Fair Employment/Housing and the Equal Employment Opportunity Commission (EEOC), San Diego Area Office. He filed the charge on EEOC Form 5. Winkler alleged that on March 17, 1995 he was "denied hire" by the Timlin Corporation (Timlin or Respondent), which he identified on the EEOC charge as an employer of between 15 and 100 employees. Winkler alleged that Timlin failed to hire him because "everyone that works at this Company has to pay income taxes, and everyone has to complete a W-4 Form and have taxes deducted, if they want to work here," which he refused to do. Winkler alleged that Timlin's insistence on tax withholding constituted discrimination against him because of his national origin and his U.S. citizenship.

On October 31, 1995, addressing the filing on the merits, the EEOC issued a Dismissal and Notice of Rights (Notice):

> Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes.

The EEOC informed Winkler of his right to sue in U.S. district court within ninety (90) days of receipt,

and that failure to do so would waive his right to sue.

On November 21, 1995, Winkler filed a charge against Timlin in letter form with the Office of Special Counsel for Immigration-Related Unfair Employment Practices, United States Department of Justice (OSC). In response, by letter dated November 22, 1995, OSC mailed Winkler a charge form on which he was advised to complete his submission. His charge, dated November 20, 1995 on the OSC form, is accompanied by an November 8, 1995 letter to OSC which acknowledged that "the EEOC dismissed . . . [his] complaint for lack of evidence."

Winkler's OSC charge alleged that, in violation of 8 U.S.C. § 1324b, Timlin discriminated against him on the basis of citizenship status and national origin, and committed document abuse. Alleging that the discrimination took place on March 17, 1995, Winkler claimed that Timlin refused to accept "documents relating to my citizenship, after I was hired." (In contrast, Winkler's November 8, 1995 letter recites that on March 17, 1995 "I was denied hire to [sic] Timlin Corporation for an Inside Sales position. I was offered the job and requested to fill out certain IRS documents and documents requiring a social security number.")

Although Winkler signed his OSC charge, OSC's determination letter (undated) -- advising that his charge and those of eight other listed individuals were rejected on the merits and as untimely -- was addressed to John B. Kotmair, Director, National Worker's Rights Committee (Kotmair). The OSC letter, addressed to Kotmair "as the representative of the injured parties in each of the . . . referenced charges," recites that

> [T]he Special Counsel has determined that there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin [discrimination] under 8 U.S.C. § 1324b . . . [or] that they state a cause of action for document abuse under 8 U.S.C. § 1324b(a)(6).

OSC, therefore, declined to file a complaint on Winkler's behalf.

On June 21, 1996, Winkler filed his Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). Winkler's Complaint was signed not by Winkler, but by Kotmair. The Complaint was accompanied by a "Privacy Act Release Form and Power of Attorney," dated June 11, 1996, by which Winkler designated Kotmair as his investigator apropos "the withholding of taxes (including but not limited to a Statement of Citizenship)," restricted to investigation with respect to Timlin. The obvious inadequacy of that power of attorney to provide representation before an administrative law judge (ALJ) is cured by the August 26, 1996 filing by Kotmair of a Notice of Appearance supported by an August 6, 1996 power of attorney by Winkler of sufficient breadth and specificity to authorize Kotmair to act as Winkler's attorney in fact. See OCAHO Rules of Practice and Procedure for Administrative Hearings, at 28 C.F.R. § 68.33(b)(6) (1966).

The Complaint, set out on OCAHO's complaint format, comprises entries in response to

inquiries at sequentially numbered paragraphs. Considered together, ¶¶ 8, 9, 13 and 16 characterize the employer's refusal to accept a "Statement of Citizenship" and to give credence to an "Affidavit of Constructive Notice" to exempt an employee from providing a Social Security Number and from tax withholding as discriminatory -- i.e., as the result of discrimination on the basis of national origin and citizenship status, and document abuse, Winkler was "knowingly and intentionally not hired." Winkler requests back pay from March 17, 1995, to August 31, 1995. ¶¶ 20, 21.

OCAHO issued a Notice of Hearing (NOH) on June 28, 1996, in response to which Timlin filed its Answer on August 1, 1996. Describing itself as a telephone sales company with sixty-two (62) employees, Timlin contended that it did not refuse to hire Winkler because of his national origin; did not ask him to complete INS Form I-9 or to disclose his national origin; did not refuse to hire him because of his citizenship status; made no inquiry about citizenship status during his interview; and that Winkler left the citizenship inquiry section of the employment application blank.

According to Timlin, to avoid tax deductions, Winkler demanded to be hired as an independent contractor:

> When told that the Company would not offer Mr. Winkler the position as an independent contractor and [that] it would comply with the tax codes as published by various state and federal laws, Mr. Winkler became aggressively insistent that Timlin Industries retain him. Timlin Industries refused and made the decision not to hire Mr. Winkler.

Answer at 6.

Timlin asserts that Complainant was rejected because "the Respondent did not want to violate federal law by accepting the Complainants [sic] offer of employment service as an Independent Contractor and for no other reason." Answer at 9. Timlin denies asking Winkler to supply any documentation because "[document] requests are made after an offer and acceptance of employment" and "Respondent did not hire Complainant." Answer at 2-4. Timlin asserts that Winkler was adamant in his refusal to be hired as anything other than an independent contractor.

> We told Mr. Winkler that if he were to change his mind and consider being hired as an employee, we would seriously consider hiring him.

Answer, Exhibit E, Statement of Timlin's President.

On October 10, 1996, Kotmair filed a "Motion to Strike Respondent's Answer And Violation of Rule 11," and a brief in support. On October 31, 1996, Terence L. Greene (Greene), Esq., filed an entry of appearance as attorney for Respondent.

On December 23, 1996, by transmittal letter from Greene dated December 16, 1996, the parties and their representatives filed a joint voluntary dismissal, containing a signature block to be

signed by the judge. The transmittal letter recites that "We have agreed with counsel for

Mr. Winkler to withhold settlement funds until we have received the conformed copy." I understand the reference to a conformed copy as anticipating signature by the judge.

II. Discussion and Findings

A. National Origin Discrimination Claim Must Be Dismissed

1. The Forum Will Dismiss a Case *Sua Sponte* for Lack of Subject Matter Jurisdiction

The Supreme Court has instructed that federal ALJs are "functionally comparable" to Article III judges. Butz v. Economou, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the ALJ is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures. Horne v. Town of Hampstead, 6 OCAHO 906, at 5 (1997).

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative oblgation to ensure that they are acting within the scope of their jurisdictional power." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. Supp. 1995).

A forum's "subject matter jurisdiction is not a waivable matter and may be raised at any time . . . *sua sponte* by the trial or reviewing court." Emrich v. Touche Ross & Co., 846 F.2d 1190, 1194 n.2 (9th Cir. 1988). A forum's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940). "[A] federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction" and to consider its jurisdiction *sua sponte*. Deep Sea Research, Inc. v. The Brother Jonathan, 102 F.3d 379, 385 (9th Cir. 1996); see also Nome Eskimo Community v. Babbitt, 67 F.3d 813, 815 (9th Cir. 1995) (citing In re Ferrante, 51 F.3d 1473, 1476 (9th Cir. 1995)).

The forum is not free to expand or constrict jurisdiction conferred by statute. Willy v. Coastal Corporation, 503 U.S. 131, 135 (1992). It must, therefore, "determine whether or not . . . [it has] jurisdiction to entertain [a] cause and for this purpose . . . construe and apply the statute under which . . . asked to act." Chicot, 308 U.S. at 376.

Furthermore, federal forae "are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" Hagans v. Lavine, 415 U.S. 528, 536 (1974) (quoting Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)). A claim is "plainly unsubstantial" where "obviously without merit" or where "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no

room for the inference that the question sought to be raised can be the subject of controversy." Hagans, 415 U.S. at 536 (internal quotations omitted) (citing Ex parte Poresky, 290 U.S. 30, 31-32 (1933)). Where, from the face of the complaint there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction.

The party invoking a forum's jurisdiction must demonstrate its existence. Farmers Ins. Exchange v. Potage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990).

2. Complainant's National Origin Claim Is Dismissed Because The Administrative Law Judge Lacks Jurisdiction

Complainant alleges discrimination based on national origin. Enactment of the Immigration Reform and Control Act of 1986, as amended, (IRCA), specifically, § 274B of the Immigration and Naturalization Act, codified as 8 U.S.C. § 1324b, was not intended to supersede EEOC jurisdiction over national origin claims where an employer's workforce exceeds fourteen employees. Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three (3) and fewer than fifteen (15) individuals. § 1324b(a)(2)(B); Huang v. United States Postal Service, 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at 2 (O.C.A.H.O.), aff'd, Huang v. Executive Office for Immigration Review, 962 F.2d 1 (2d Cir. 1992) (unpublished); Akinwande v. Erol's, 1 OCAHO 144, at 1025 (1990),[1] 1990 WL 512148, at 2 (O.C.A.H.O.); Bethishou v. Ohmite Mfg., 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at 3 (O.C.A.H.O.); Romo v. Todd Corp., 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at 20 n.6 (O.C.A.H.O.), aff'd, United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990).

Once the EEOC exercises jurisdiction, the ALJ no longer is authorized to act. Wockenfuss v. Bureau of Prisons, 5 OCAHO 767, at 2 (1995), 1995 WL 509453, at 6 (O.C.A.H.O.). This is true even where EEOC errs in assuming jurisdiction. Adame v. Dunkin Donuts, 5 OCAHO 722, at 3 (1995), 1995 WL 217517, at 3 (O.C.A.H.O.).

Prior exercise of EEOC jurisdiction over Winkler's Complaint precludes present OCAHO jurisdiction. Section 1324b(b)(2) precludes liability for alleged unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEO charge. Wockenfuss, 5 OCAHO 767, at 3, 1995 WL 509453, at 6; Adame, 5 OCAHO 722, at 3-5, 1995 WL 217517, at 3. Section 1324b provides in pertinent part:

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[1]Citations to OCAHO precedents in bound Volume I, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) [national origin discrimination] . . . if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under title VII of the Civil Rights Act of 1964 [42 U.S.C. Sect. 2000e et seq], unless the charge is dismissed as being outside the scope of such title.

8 U.S.C. § 1324b(b)(2).

Appendix C to Respondent's Answer is the EEOC Notice of October 31, 1995. As Winkler acknowledged, he filed and lost his EEOC charge of national origin discrimination based on the same set of facts as alleged in his subsequent Complaint. The Notice makes unmistakably clear that the EEOC dismissed the charge as lacking in merit, not on jurisdictional or time-barred grounds, but because he did not establish a statutory violation.

Nowhere does Complainant's 25-page brief in support of its Motion to Strike Respondent's Answer rebut or refer at all either to the assertion in the Answer that Timlin employed 62 employees or to the Notice evidencing the EEOC's rejection of Winkler's Charge. It is undisputed that EEOC exercised jurisdiction over Winkler's national origin discrimination claim, and that Timlin employed more than fourteen individuals. Consequently, I necessarily find that at all times relevant to this action: (1) Respondent employed more than fourteen individuals; (2) that a charge with respect to national origin discrimination based on the same set of facts was filed with the EEOC under Title VII of the Civil Rights Act of 1964; (3) that such charge was dismissed on its merits; and that I therefore lack subject matter jurisdiction over Complainant's national origin discrimination claim. I therefore dismiss that portion of the Complaint alleging national origin discrimination. 8 U.S.C. § 1324b(a)(2)(B).

B. Complainant's Claims of Discrimination on the Basis of Citizenship Status and Document Abuse Are Dismissed for Failure to State a Claim Upon Which Relief May be Granted Under IRCA and Because This Forum Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act

In order to state a citizenship status discrimination or document abuse claim upon which relief can be granted, a complaint must contain a prima facie recitation that the putative employer committed an unfair immigration-related employment practice as defined in 8 U.S.C. §§ 1324b(a)(1)(B) and 1324b(a)(6), respectively.

Winkler alleges that Timlin's refusal to hire him for his refusal to provide a social security number/card constitutes citizenship status discrimination. Specifically, as to citizenship status discrimination, Winkler alleges that he was not hired because "the company refused to accept and acknowledge his Statement of Citizenship and his claim that his Citizenship effects [sic] the fact that he is not required to be subject to the Social Security Act." Complaint, ¶ 13b. Specifically, as to

document abuse, he alleges that Timlin refused to accept his "Statement of Citizenship (which shows that he was a U.S. citizen and not subject to the withholding of Income Taxes pursuant to Federal Law)," and refused to accept his "Affidavit of Constructive Notice (explains that he can not provide a social security number)." Id. at ¶ 16a. Asked to identify the

"too many or wrong documents than required to show that I am authorized to work in the United States," Complainant responded: "Social Security Number/Card." Id. at ¶¶ 17, 17a.

OCAHO precedent provides "for dismissal *sua sponte* by an administrative law judge, if he or she determines that Complainant has failed to state a claim upon which relief can be granted." Mendez v. Daniels, 2 OCAHO 392, at 7 (1991) (citing 28 C.F.R. § 68.10, "If the Administrative Law Judge determines that the complainant has failed to state . . . a claim [upon which relief can be granted], the Administrative Law Judge may dismiss the Complaint"), 1991 WL 531903, at 5 (O.C.A.H.O.). This is so even where a complainant appears pro se. Id.

"'Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action.'" United States v. Anchor Seafood Distrib., Inc., 5 OCAHO 742, at 4 (1994) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwartzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)), 1995 WL 367106, at 2 (O.C.A.H.O.); United States v. Anchor Seafood Distrib., Inc., 4 OCAHO 718, at 3 (1994), 1994 WL 765377, at 2 (O.C.A.H.O.).

The purpose of summary decision is "to avoid an unnecessary hearing when there is no genuine issue of material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters." United States v. Anchor Seafood Distrib., Inc., 5 OCAHO 742, at 4 (1995) (citing United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991)), 1995 WL 367106, at 2 ; Anchor Seafood Distrib., Inc., 4 OCAHO 718, at 3 (1994), 1994 WL 765377, at 3. "A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Anchor Seafood Distrib., Inc., 5 OCAHO 742, at 4 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994)), 1995 WL 367106, at 3; Anchor Seafood Distrib., Inc., 4 OCAHO 718, at 3, 1994 WL 765377, at 2. In determining whether there is a genuine issue of material fact, all facts and inferences drawn from them are to be construed in favor of the non-moving party. Id. (citing Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986); Primera Enters., Inc., 4 OCAHO 615, at 2)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue. . . ." Matsushita, 475 U.S. at 586. "Summary judgment may be based on matters deemed admitted." Anchor Seafood Distrib., Inc., 5 OCAHO 742, at 5 (citing Primera Enters., Inc., 4 OCAHO 615 at 3; United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991)), 1995 WL 367106, at 4; Anchor Seafood Distrib., Inc. 4 OCAHO 718, at 5, 1994 WL 765377, at 4.

As an action under § 1324b, Winkler's claim is so "obviously without merit . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject

of controversy." Hagans, 415 U.S. at 536.

1. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted Under 8 U.S.C. § 1324b

Winkler alleges that Timlin's insistence on completion of Form W-4 as a precondition for employment and Timlin's refusal to "accept and acknowledge . . . [Winkler's] Statement of Citizenship and his claim that his citizenship effects [sic] the fact that he is not required to be subject to the Social Security Act" constitute discriminatory conduct that violates § 1324b. Complaint ¶¶ 13 and 16. In order for Timlin's conduct to have violated § 1324b(a)(1)(B), Timlin would need to have discriminated on the basis of citizenship status, and to have violated § 1324b(a)(6) Timlin would need to have demanded Winkler's social security card for the purpose of satisfying the employment verification requirements of § 1324a(b) under circumstances in which this demand would be for "more or different documents than are required." Westendorf, 3 OCAHO 477, at 10, 1992 WL 535635, at 5.

a. Complainant Fails To Establish a Prima Facie Case of Discrimination Based on Citizenship Status

It is a complainant's burden to prove citizenship status discrimination. Toussaint, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at 12; United States v. Mesa Airlines, 1 OCAHO 462, 500 (1989), 1989 WL 433898, at 32 (O.C.A.H.O.), appeal dismissed, Mesa Airlines v. United States, 951 F.2d 1186 (10th Cir. 1991). In order to prevail on a claim of citizenship status discrimination a complainant must be able to prove less favorable treatment than others because of citizenship. Westendorf , 3 OCAHO 477, at 6-7, 1992 WL 535635, at 7. Here, however, Winkler's EEOC charge admits that Timlin intended to treat him the same as other employees:

> [E]veryone that works at this Company has to pay income taxes, and everyone has to complete a W-4 Form and have taxes deducted, if they want to work here.

EEOC "Charge of Discrimination," June 8, 1995.

The dispute between the parties concerns whether Winkler is subject to withholding for income tax and social security deductions. The dispute does not implicate the law prohibiting citizenship status discrimination. See Horne v. Town of Hampstead, 6 OCAHO 906, at 4-5 (1997); Lee v. Airtouch Communications, 6 OCAHO 901, at 11 n.8 (1996). Winkler fails to allege one of the four essential elements of a prima facie case for citizenship status discrimination.

A prima facie case of citizenship status discrimination, adapted from the framework the Supreme Court developed in McDonnell Douglas Corp. v. Greene, 411 U.S. 492 (1973) and elaborated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:

(1) he is a member of a protected class;

(2) the employer had an open position for which he applied;

(3) he was qualified for the position; and

(4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Lee v. Airtouch, 6 OCAHO 901, at 11.

Where a complainant establishes a prima facie case, the burden shifts to the employer to assert a legitimate, non-discriminatory reason for its employment decision. St. Mary's Honor Cntr v. Hicks, 509 U.S. 502, 507 (1993). Where, however, a complainant is unable to present a prima facie case, "the inference of discrimination never arises and the employer has no burden of production." Lee v. Airtouch, 6 OCAHO 901, at 11 (citing Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992)).

Winkler can satisfy the first of the four prongs for a prima facie case of citizenship discrimination. As a United States citizen, Winkler is a member of a class protected by § 1324b from citizenship status discrimination. Toussaint, 6 OCAHO 892, at 17 n.11, 1996 WL 670179, at 13, n.11. As defined by § 1324b(a)(3), the class of "protected individuals" entitled to benefit from the prohibitions of § 1324b(a)(1)(B) includes United States citizens.

Winkler also satisfies the second prong: Timlin had an open position for which Winkler applied.

And he satisfies the third: He was qualified for the position.

Winkler, however, is unable to satisfy the fourth prong. Here, Winkler articulates in his own submission the reason for Timlin's actions: Accepting a characterization of events most favorable to Winkler, he chose not to comply with Timlin's demand that its employees make requisite tax and social security deductions. Winkler states that he:

> [W]as lawfully unable to provide a number, pursuant to the letter of the law as he has preserved his right as a U.S. Citizen to not be encumbered by the provisions of the Social Security Act by voluntarily obtaining a number.

Complainant's Brief in Support of Motion to Strike Respondent's Answer at 5-6. Winkler's challenge to the Social Security Act and to income tax withholding, however, is not properly within this court's jurisdiction, nor does it invite an inference that Timlin discriminated on citizenship bases in not hiring him. I do not credit Complainant's apparent theory that only non-citizens are subject to producing social security numbers and are amenable to compulsory tax withholding. But even if that were the law, Complaint's gripe is not with immigration law. Nothing in the employment eligibility verification process touches on an employee's federal income tax withholding obligations. And the call for entry of a social security number is in Section 1 of the Form I-9 in which the employee after hire -- not a candidate for employment -- is obliged by the government, not the employer, to provide that number. The Attorney General is authorized at 8 U.S.C. § 1324b(1)(A) to establish an employment eligibility verification form; that is the Form I-9. 8 C.F.R. § 274A.2(2). The Instructions accompanying the Form I-9 direct that "all employees, citizens and noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for insuring that Section 1 is timely and properly completed.**" (Emphasis in original). U.S. Department of Justice, Immigration & Naturalization Service Form I-9 Instructions (Rev. 11-21-91) OMB No. 1115-0136 (detailing instructions for completing INS Form I-9).

It follows that under any conceivably reasonable reading of his Complaint, Winkler cannot establish a prima facie case of citizenship status discrimination. His Complaint is so attenuated and unsubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing. Therefore there is no call on Timlin to articulate a legitimate, non-discriminatory reason for not hiring Complainant. It is certain, however, Winkler's insistence that he be exempted from Timlin's lawful and nondiscriminatory scheme of tax and social security compliance would be a legitimate, nondiscriminatory reason for not hiring him. The Ninth Circuit instructs that even where a complainant may be able to make out a prima facie case, pre-trial summary judgment is appropriate where there is no evidence to refute a respondent employer's legitimate explanation, "even though there has been no assessment of the credibility of [the employer] at this stage." Wallis v. J. R. Simplot Co., 26 F.3d 885, 892 (9th Cir. 1994).

Maximizing opportunities to amend discrimination complaints is generally encouraged. See Fuller v. City of Oakland, Ca., 47 F.3d 1522, 1535 (9th Cir. 1995); Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1085 (9th Cir. 1995). Because, however, Winkler relies exclusively on Timlin's refusal to accept his documents as the gravamen of his discrimination claim, the consequential lack of any discernible meritorious § 1324b claim forecasts that amendment would be futile. Winkler's claim is therefore dismissed for failure to state a claim cognizable under IRCA.

b. Winkler's Complaint Is Not Document Abuse Within the Meaning of IRCA

Section 1324b(a)(6) makes it unlawful for employers to demand particular documents from among the Form I-9 catalogue of documents specified for satisfying employment eligibility verification obligations. Westendorf, 3 OCAHO 477, at 10, 1992 WL 535635, at 5; Lewis v. McDonald's

Corp., 3 OCAHO 383, at 5 (1991), 1991 WL 531895, at 3 (O.C.A.H.O.); United States v. Marcel Watch Corp., 1 OCAHO 143, at 1003 (1990), 1990 WL 512142, at 13 (O.C.A.H.O.), amended, 1 OCAHO 169, at 1158 (1990), 1990 WL 512157 (O.C.A.H.O.). For example, were a job applicant to produce one of the documents listed in "List A" of section 2 of Form I-9, or produce one of the documents listed in "List B" and one of the documents listed in "List C" of section 2 of Form I-9, but not an original social security card, and were an employer to demand that in addition or in lieu of the proferred documents the applicant produce a social security card as a precondition of employment, § 1324b(a)(6) would be violated. Westendorf, 3 OCAHO 477, at 10, 1992 WL 53565, at 5.

Winkler, however, does not allege that Timlin requested a social security card for purposes of establishing employment eligibility. Nor does Winkler contend that he was asked, as part of the I-9 process, to produce a social security card in preference to, in lieu of, or in addition to other employment verification documents. Indeed, Timlin contends, and Winkler's lengthy motion in opposition to the Answer does not dispute, that the hiring process never reached the employment verification stage in which documents would be requested.

Instead, Winkler gratuitously engaged Timlin in a pre-employment philosophical and political colloquy that culminated in Timlin's refusal "to accept and acknowledge . . . [Winkler's] Statement of Citizenship and his claim that his citizenship effects [sic] the fact that he is not required to be subject to the Social Security Act." Complaint, ¶ 13. Most significantly, the face of the Complaint demonstrates the threshold deficiency in Complainant's effort to manipulate the § 1324b prohibition against document abuse by cloaking challenges to United States Tax Code and Social Security Act compliance regimes in an unrelated cause of action against a prospective employer. That this is so is apparent from even a cursory review of the Form I-9 which identifies the documents acceptable for employment eligibility verification purposes, no one of which can be reasonably understood to embrace the two documents relied on by Complainant. Simply stated, characterizing the Complaint in a light most favorable to Winkler by assuming the *facts* in a light most favorable to him, as § 1324b(a)(6) commands in *haec verba*, there can be no violation of the prohibition against document abuse where the documents tendered are *not* documents "required under" 8 U.S.C. § 1324a(b).

Assuming that Timlin demanded Winkler's social security number, "there is no suggestion in IRCA's text or legislative history that an employer may not require a social security number as a precondition of employment." Westendorf, 3 OCAHO 477, at 10, 1992 WL 535635, at 7. "OCAHO case law correctly holds that nothing in the logic, text or legislative history of the Immigration Reform and Control Act [IRCA] limits an employer's ability to require a Social Security number as a pre-condition of employment." Toussaint, 6 OCAHO 892, at 17 (citing Lewis v. McDonald's Corp., 2 OCAHO 383, at 4, 1996 WL 670179, at 13). "[N]othing in IRCA limits an employer's ability to require a Social Security number as a precondition of employment . . . [unless an employer] applies this requirement in a discriminatory way." Toussaint, 6 OCAHO 892, at 18-19, 1996 WL 670179, at 14. "Because a request for a social security number is not a request for a document at all, this [request] . . . does not implicate any issues which come within the jurisdiction of OCAHO." Lee v. Airtouch Communications, 6 OCAHO 901, at 7 (1996).

The INS Form I-9 is the document to be executed by employers and employees at the time of hire in compliance with the employment eligibility verification regimen established to implement the statutory imperative of § 1324a(b). Although the Complaint refers to a "number/card," Winkler's pleadings demonstrate that Timlin did not request that Winkler produce his social security card in connection with the preparation of the employer's section, § 2 of the Form I-9, but establish that during the job interview process Winkler initiated a confrontation implicating instead his tax and social security nullification documents, i.e., his "Statement of Citizenship" and "Affidavit of Constructive Notice." Because those documents are in derogation of the list stipulated on the Form I-9 which the Attorney General has prescribed for § 1324a(b) compliance, the Complaint fails to state a cause of action for breach by Timlin of § 1324b(a)(6). See Horne v. Town of Hampstead, 6 OCAHO 906, at 8-9.

I therefore dismiss the document abuse claim for failure to state a claim upon which relief can be granted.

2. This Forum Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act

In Horne v. Town of Hampstead, 6 OCAHO 906, refusal to comply with the income tax and social security regimen by an individual employed by the § 1324b respondent was held insufficient to state an 8 U.S.C. § 1324b cause of action against the employer. The present case holds that a § 1324b claim against an employer that allegedly failed to hire a job applicant:

(a) who refused to comply with federal income tax and social security accountability requirements fails to state a § 1324b(a)(1)(B) citizenship status discrimination claim on which relief can be granted, and

(b) who insisted on acceptance of documents other than those identified by the Attorney General for compliance with 8 U.S.C. § 1324a(b) fails to state a § 1324b(a)(6) claim on which relief can be granted.

The Complaint does not suggest that Winkler was treated differently than other job applicants. Winkler's contention -- that judicial precedent supports the hypothesis that as a United States citizen he is less amenable to tax withholding or to social security practice and procedure than is a non-citizen -- is immaterial here where this tribunal of limited jurisdiction is powerless to respond to allegations that tax and social security compliance is offensive to any one or a number of individuals.

Complainant finds nourishment in Equal Employment Opportunity Commission v. Information Systems Consulting, Civil Action No. CA3-92-0169-T (D.C., E.D. TX) (1992) (a case arising from Title VII employer obligations to reasonably accommodate religious beliefs in the workplace). Correctly noting that a government agency supported an employee's refusal to obtain a social security number, Complainant fails to mention that the court's consent decree approving settlement of a Title VII Civil Rights Act contained a significant caveat: "This decree is being issued with the consent of the

parties and does not constitute an adjudication or finding by this Court on the merits of the allegations of the complaint." Id. at 3. Moreover, that case, initiated by the EEOC, involved a freedom of religion claim by the employee seeking not to participate in the social security system.[2] This § 1324b claim is one of citizenship status discrimination, and not that of free exercise of religion, over which in any event I lack jurisdiction.

Complainant relies extensively on Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935), one of the last of a line of cases fatal to acts of Congress premised on the commerce clause which held a compulsory retirement and pension plan beyond congressional powers to regulate interstate commerce. Complainant's reliance on Alton is misplaced. More to the point, as early as 1937 the Supreme Court affirmed Congress' power to enact social security legislation. See Helvering v. Davis, 301 U.S. 619, 644 (1937), and Chas. C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937).

Winkler v. Timlin has nothing to do with the employer's obligations under 8 U.S.C. § 1324b and everything to do with the job applicant's unwillingness to participate in federal income tax and social security withholding. The Complaint is therefore dismissed for lack of subject matter jurisdiction.

C. Approval of Agreed Voluntary Dismissal Denied

Title 28 C.F.R. § 68.14(a) provides that parties to a complaint who have entered into a proposed settlement agreement shall submit to the presiding ALJ the agreement containing consent findings and a proposed decision and order. 28 C.F.R. § 68.14(a)(1). Alternatively, the parties may notify the ALJ that they have reached a settlement and agreed to a dismissal, subject to the approval of the ALJ. 28 C.F.R. § 68.14(a)(2).

Winkler and Timlin have elected the latter option, asking that I enter an order in which the judge joins the parties in a stipulation captioned "Voluntary Dismissal," "all the parties" agreeing "that the entire matter be voluntarily dismissed with prejudice." The letter from counsel for Timlin transmitting the proposed order explains that "we have agreed with counsel for Mr. Winkler to withhold settlement funds until we have received the conformed copy." The term "conformed copy" necessarily refers to the "Voluntary Dismissal" if and when it is signed by the judge. I cannot approve the voluntary dismissal.

Title 28 C.F.R.§ 68.1 provides that for situations not covered by 28 C.F.R. Part 68, the Rules

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[2] But compare Bowen v. Roy, 476 U.S. 693, 702 (1986) (rejecting a challenge on religious grounds to providing a social security number as a condition precedent to receiving food stamps, the Court found no violation of the First Amendment's free exercise of religion clause, notwithstanding plaintiff's belief that use of a number would impair Native American child's spirit, because "The statutory requirement that applicants provide a social security number is wholly neutral in religious terms and uniformly applicable").

of Civil Procedure for United States District Courts are available as guidelines. Accordingly, it is necessary and appropriate to apply Fed. R. Civ. P. 41(a)(2). "[R]ule 41(a) . . . forbids voluntary dismissal without court approval once the defendant has answered." Van Kast v. Bd. of Education of City of Chicago, 1988 WL 142247, at 2 (N.D. Ill. 1988). Compare Horne v. Hampstead, 6 OCAHO 884, at 3 (1996), 1996 WL 658405, at 2 (O.C.A.H.O.). Voluntary dismissals under Rule 41(a)(2) are within the court's sound discretion. Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993).

Although the parties did not include their agreement in soliciting judicial participation in the voluntary dismissal, Respondent's transmittal confirms that it is predicated upon a payment by Respondent to Complainant, subject to judicial approval. Given this forum's inability to entertain Complainant's § 1324b claim, I am unable to provide that approval.

Recent OCAHO cases deal with the types of claims alleged by Winkler. All were dismissed. See Horne v. Town of Hampstead, 6 OCAHO 906; Lee v. Airtouch Communications, 6 OCAHO 901, at 13-14; Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892, at 21-23, 1996 WL 670179, at 17-18. As early as 1991, related issues were addressed extensively in Lewis v. McDonald's Corp., 3 OCAHO 383, at 5, 1991 WL 5318895, at 3.

In light of OCAHO precedent, compelling the conclusion that the obvious infirmities are fatal to the pending claim, it would exceed the jurisdiction of the ALJ to place a judicial imprimatur on an award. Absent subject matter jurisdiction over a complaint which fails to state a cause of action on which the forum can grant relief, judicial power is unavailable to approve a settlement which implicitly assumes the employer's liability. A § 1324b claim as insubstantial and lacking of merit as the present one cannot obtain a judicial blessing, whether by concurring in an agreed disposition or otherwise.

III. Conclusion and Order

The national origin claim is dismissed for want of jurisdiction.

The document abuse and citizenship status claims are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under 8 U.S.C. § 1324b.

Approval of the agreed voluntary dismissal is denied.

IV. Appeal

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated and entered this 30th day of January, 1997.

_____

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Decision and Order to Dismiss and to Deny Approval to Agreed Voluntary Dismissal were mailed postage prepaid this 30th day of January 1997, addressed as follows:

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